IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 252 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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DHANANJAY UMESHBHAI SHARMA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MP SHAH for Appellant(s) : 1,
MR KP RAVAL, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 30/08/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. By way of filing present appeal, the appellant-orig.accused Dhananjay Umeshbhai

Sharma (hereinafter referred to as 'the accused') has challenged the judgment and order of conviction and sentence dated 12th December, 2000, passed by the learned Additional Sessions Judge, Surat in Sessions Case No.269 of 1999. At present the accused is undergoing sentence of imprisonment imposed by the learned trial Judge for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code. The accused is ordered to undergo rigorous imprisonment for three years for the offence punishable under Section 363 of the Indian Penal Code and a fine of Rs.500/-; and in default of payment of fine, he is ordered to undergo imprisonment for one more month; for the offence punishable under Section 366 of the Indian Penal Code, he is ordered to undergo rigorous imprisonment for same period i.e. for three years and a fine of Rs.1000/-, and in default to undergo imprisonment for two more months; and for the offence punishable under Section 376 of the Indian Penal Code, he is ordered to undergo rigorous imprisonment for 10 years and a fine of Rs.2000/-, and in default to undergo

imprisonment for three more months. As the substantive sentence is ordered to run concurrently under the scheme of Section 427 of the Code of Criminal Procedure, 1973, the maximum period of punishment can be said to be rigorous imprisonment for 10 years.

2. The judgment and order of conviction and sentence is assailed on various grounds mentioned in paragraph no.5 of the memo of appeal and it is contended that the conviction of the accused is illegal and bad in law. The finding recorded by the learned trial Judge is based on improper or illegal interpretation of evidence and the learned trial Judge ought not to have convicted the accused for the charges levelled against him. To appreciate the say of the accused placed before us and the resistance placed by the respondent-State, it would be appropriate for us to state the following facts placed by the prosecution in brief :

(i) It is alleged that in the ghastly offending act, one minor girl aged about 2 years has been raped by the

accused-Dhananjay on 16th May, 1999 at about 08-00 p.m. Gajendra Pande-complainant-father of the victim, at that point of time had gone to attend one marriage ceremony. Renuka-wife of the complainant, her minor daughter i.e. victim and Devendra, brother of the complainant, who was sick, were at home. Renuka was preparing food and her daughter-victim was playing on the abutting “Otta”. After some minutes, Renuka tried to ascertain the presence of her daughter-victim and she found that her daughter was not there. Therefore, she asked her neighbour-cum-tenant Shri Vijaykumar about her daughter-victim and asked him to help her in finding out her daughter-victim if she is in the nearby area or not. At about 09-00 p.m. to 09-15 p.m., the said Vijaykumar brought her daughter-victim in practically unconscious

and bleeding condition and he informed Renuka that the accused-Dhananjay was sleeping with her daughter-victim on the bank of “Khadi” situated behind her residence.

(ii) According to the prosecution case, on seeing Vijaykumar, the accused-Dhananjay ran away leaving the victim there. As the victim was bleeding from vagina, Renuka and Vijaykumar both took the victim to the dispensary of one Dr.Tripathi. The said Dr.Tripathi informed that they should take the victim to the Civil Hospital for treatment as a wrong has been committed to her and thereafter, the victim was taken to the Civil Hospital for treatment. She was admitted in the hospital. On return of Gajendra-complainant from the marriage ceremony, he was informed by the people residing in the neighbourhood that the victim

has been taken to the hospital and, therefore, he rushed to the Civil Hospital at Surat. The parents of the victim ultimately realised that the victim was kidnapped by the accused and the accused had committed rape on her. The father of the victim ultimately gave complaint regarding the incident to the Police Sub-Inspector posted at the Limbayat Police Station of Surat City. The complaint has been registered with Limbayat Police Station as F.I.R. at about 04-45 a.m. on 17th May, 1999, for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code.

(iii) According to prosecution, when Dr.Jagdish Shah examined the minor victim on 17th May, 1999 at about 03-10 a.m. as an injured patient, the following injuries were found/noticed by the doctor, which

are mentioned in the certificate issued by the doctor and proved during the course of trial :

I. Tear, 1 X 0.5 c.m. X Skin deep over the perineum at 6 O'clock position and 12 O'clock +nt around anus.

II. No active bleeding P/R.

III. Anus sphincter tone decreased.

IV. Anus pastulous.

V. Bleeding Plv present.

VI. Hymen torn.

VII. 1st degree vaginal tear about 5mm +nt at 6 O'clock.

VIII. No active bleeding from tear and from inside the vagina.

It is relevant to note that even the defence counsel has not disputed as to the nature of injuries noticed by the said Dr.Jagdish Shah because the defence is that the appellant is not the

culprit of the criminal wrong committed qua the victim.

(iv) It is also the say of the prosecution that immediately after bringing the minor victim from “Khadi” area as she was found bleeding from vagina, the residents of the neighbouring area including Vijaykumar had traced out the accused in couple of minutes and the accused was house-arrested in some portion of the house of the complainant. The police ultimately drew a formal arrest panchnama in the Police Station and on completion of the investigation as the evidence collected by the Investigating Agency was sufficient, the accused was chargesheeted.

3. After recording oral as well as documentary evidence led by the prosecution, the prosecution has successfully established all the charges levelled against the accused and

therefore, the learned trial Judge held the accused guilty and passed the aforesaid judgment and order of conviction and sentence. The present appeal is a challenge to the said findings recorded by the learned trial Judge.

4. While developing the arguments the learned advocate for the accused has submitted mainly on the following aspects :

4.1 The FIR lodged by the prosecution cannot be looked or read as an FIR lodged under Section 154 of the Code of Criminal Procedure, 1973 and the learned trial Judge has committed a grave error in considering the contents of the FIR because the police had already reached to the hospital much prior to arrival of the complainant-father of the victim girl at Civil Hospital, Surat.

4.2 The evidence of orig.complainant Gajendra Pande-father of the victim i.e.PW-1, Ex.12, is based on facts gathered by this witness from more than one person including his wife Renuka. Undisputedly, he was not present till the victim was admitted in the hospital for

treatment.

4.3 Though the orig.accused was allegedly apprehended and confined in the house of the complainant, his name is not reflected in the hospital papers as a culprit; otherwise the doctor who recorded the history must have noted his name. When Vijaykumar had left the city for any unknown reason and has not stepped into the witness-box voluntarily and has avoided the service of process, it was possible for the learned trial Judge to consider as an important argument that this Vijaykumar himself may be the culprit and this possibility raises a shadow of doubt on the case of the prosecution.

4.4 Devendra-brother-in-law of Renuka and real uncle of victim girl examined by the prosecution, has not stated anything about confinement of Dhananjay in the house where he was lying sick and this witness should have corroborated fully to the version of PW-Renuka. However, PW-Renuka is not getting any corroboration of substantive nature from this witness. So the evidence led by this witness

PW-Devendra being very weak piece of evidence, shatters the credibility of two important witnesses i.e. Renuka and the complainant-father of the victim girl.

4.5 The evidence of PW-Renuka and PW-Devendra as to the apprehension of Dhananjay in couple of minutes from the time of incident does not get corroboration from the Investigating Officer because no formal arrest is shown of the orig.accused-Dhananjay from the house of the orig.complainant. On the contrary, the Investigating Officer has not rendered any explanation as to how and when the accused was brought to the Police Station. Negligence of the Investigating Officer of not drawing the panchnama of formal arrest at the residence of Renuka makes the prosecution case doubtful as to the immediate apprehension of the accused and his confinement. On the contrary, by some good gestures, he might have cleverly implicated the accused in the offence. The negligence on the part of the prosecution in drawing arrest panchnama of the accused and in collecting clothes which were sent for

examination to FSL (Forensic Science Laboratory) are not able to provide any strength. In the present case, the Investigating Officer ought to have drawn formal arrest panchnama at the residence of Renuka by pointing out the specific time. The second panchnama was required to be drawn in the Police Station or in the hospital itself where he was required to be sent for examination. The Investigating Officer ought to have kept the accused in his custody for long hours and there is no explanation as to why he was taken for examination to Civil Hospital after lapse of some hours. This as per the say of Mr.Shah creates doubt on the transparency of investigation.

4.6 The medical certificate of the accused does not clearly support the case of the prosecution as no injury of material nature was found on the genetic organ/penis of the accused. When the victim girl, according to the case of the prosecution, was two years of age, the scope of sustaining injury by the accused was there. The prosecution has not satisfactorily led the

evidence on this aspect.

4.7 The hospital papers are available on record, but certain pages of the entire bunch of papers have been exhibited and name of accused reflected as culprit in the hospital papers cannot be looked into because the said page of the bunch of papers has not been exhibited by the learned trial Judge and this Court also should not consider the entire bunch of documents available on record as substantive piece of evidence. Inadmissible and hearsay evidence has been considered by the learned trial Judge on crucial aspects.

4.8 The prosecution has not examined Vijaykumar conveniently and the learned trial Judge has also failed in exercising jurisdiction vested with him under Section 311 of the Code of Criminal Procedure, 1973. It could have called Vijaykumar as Court witness to find out the truth and to defeat the ill-will of prosecuting agency. In support of this argument, Mr.M.P. Shah, learned counsel appearing for the respondent-orig.accused, has taken us through

the provisions of Section 311 of the Code of Criminal Procedure, 1973 and the comments made by the author on the scheme of Section 311 of the Code of Criminal Procedure, 1973. However, he has concentrated his arguments on the ratio propounded by the Apex Court in the case of **Shailendra Kumar v. State of Bihar and others, reported in 2001(8) Supreme 513,** wherein the Apex Court has made certain observations as to the duty of the Presiding Judge of the Court and the Prosecuting Agency and has taken us through the following part of the decision:

> “9. .. .. .. From the facts stated above, it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Addl. Sessions Judge as well as the APP have not taken any interest in discharge of their duties. It was the only duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial

of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present, it is the duty of the Court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in lurch."

4.9 The prosecution has not examined Dr.Tripathi. This witness could have given strength to the prosecution about the involvement of the accused and this infirmity makes the case of the prosecution doubtful.

5. In the case of **Shailendra Kumar (Supra)**, the Apex Court had inferred specifically from the facts and evidence available on record that by one way or the other, the learned Additional Sessions Judge as well as the learned

Additional Public Prosecutor have not taken any interest in discharging of their duties. It was the duty of the Sessions Judge to issue summons to the Investigating Officer if he fails to remain present at the time of trial of the case. It is true that in the present case, the Investigating Officer was not called by the learned trial Judge and it was possible for the learned trial Judge to exercise powers vested with the Court under Section 311 of the Code. It is not necessary for us to quote Section 311 of the Code of Criminal Procedure, 1973 but bare reading of the said Section reveals that it is of very wide amplitude if there is any negligence, latches or mistake by not examining the material witnesses, the Courts function to render just decision by examining such witnesses at any stage is not, in any way, impaired. The function of the Criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

6. According to us, in the present case, non-

exercise of powers vested with the learned trial Judge under Section 311 of the Code of Criminal Procedure, 1973, even if is considered as an error, it is not a material lapse or negligence on the part of the Court or the learned Additional Public Prosecutor, resulting into prejudice to eitherside because more than one reasonable attempts were made to serve the process to the said Vijaykumar and an affidavit of the concerned responsible officer to that effect is available on record.

6. The decision of the Apex Court in the case of ***Manish Dixit and others v. State of Rajasthan, reported in 2000(7) Supreme 364,*** with other Criminal Appeals filed by the co-accused Sharad Dhakar @ Bantu and others, cited by Shri M.P.Shah reaffirms the settled legal position, where the Apex Court in paragraph no.12 of the decision has said that :

> "12. To obviate the said difficulty the Public Prosecutor in the trial Court made a futile attempt to

render the statement made by Michael Hens to the inmates of Gulshan Makhija as evidence falling within the purview of Section 6 of the Evidence Act. That attempt gained success at the trial stage as the Sessions Judge approved the contention. But the Division Bench of the High Court has very rightly repudiated such a contention. As the counsel for the State did not make even an attempt to render such statement admissible in evidence, we are relieved of the task to deal with that statement."

7. In this cited decision, when the accused was chargesheeted by the Investigating Officer, his case was not based on circumstantial evidence but the same was on the foundation of the statement made by one solitary witness Michael Hens. This Michael Hens was not examined by the prosecution and the prosecution had not explained satisfactorily as to how and why he could not produce Michael Hens, a solitary eye-witness before the Court

to give evidence in the trial. It was argued before the Apex Court that the solitary eye-witness was the German tourist and he had already left the country before the trial started. The Apex Court observed that **"we feel that he should have been allowed to go back only on an undertaking that he would return to India for giving evidence in this case, he being the solitary eye-witness. Why the prosecution and the State did not adopt such a precautionary measure is not explained to us satisfactorily. This lapse rendered the prosecution to transform this case to one of circumstantial evidence alone."** In the present case, the facts available on record are slightly different and this sole difference, according to us, is significant and legally important. It is true that the person shown as witness namely Vijaykumar has not been examined. Number of attempts were made to serve him the process of the Court but no attempt was made for his arrest by issuing a bailable warrant and thereafter, when there was need, a non-bailable warrant at a

subsequent stage ought to have been issued. There is some logic and force in the argument of Mr.Shah that the original Investigating Officer ought to have been called personally by the Court and he ought to have been sent personally to execute the process so that he can identify the person witness taking help of the other sources as Vijaykumar had settled in Surat. But we are not able to accept the argument of Mr.Shah that the Court itself ought to have issued process suo motu in exercise of powers vested with the Court under Section 311 of the Code of Criminal Procedure, 1973 with a view to see that true and correct facts are made available to the Court while appreciating the evidence collected against the accused. Such powers are discretionary and the Court should go very slow in assuming the role of a public prosecutor directly or indirectly when it comes to exercise powers vested with the Court under Section 311 of the Code of Criminal Procedure, 1973 in respect of a person who is not either produced or examined by the prosecution. It is very likely that such an attempt would protract the trial

for pretty long; especially when the nature of the case was not getting changed materially, which was found by the Apex Court in the case of Manish Dixit (supra). Here the case against the accused is that when PW-1 Renuka-mother of the victim realised that her daughter victim who was sitting on the 'Otta' abutting to her house was not there, she started searching her and sought for help of her neighbour-cum-tenant Shri Vijaykumar. This fact stated by her is in the nature of direct evidence. It is possible to argue that corroborative piece of evidence in this regard by Vijaykumar could have added more strength to this part of her version. She has said in her cross-examination that she does not know PW-Brijeshkumar. A pointed question was asked to PW-Renuka by the defence counsel during her cross-examination as to whether Vijaykumar had told her the fact that Brijesh Kumar had seen her daughter being kidnapped which was conveyed to Vijaykumar by Brijesh Kumar. It appears that this witness must have realised before her deposition in the Court that this PW-Brijeshkumar is not likely to support the case of the prosecution

and, therefore, she has attempted to modulate her version as to his acquaintance and other aspects and presence of PW-Brijeshkumar at the relevant point of time. The Court after referring to the police statement of Brijeshkumar has disallowed the above question and obviously, therefore, no formal answer to this question is available on record. It is true that the question asked was not totally irrelevant because as per the scheme of Section 23 of the Indian Evidence Act, a fact relevant to a relevant fact is relevant. We have carefully considered the evidence of PW-Brijeshkumar who is treated as hostile and it is clear from record that the case of the prosecution is that the said Brijeshkumar had seen the accused Dhanjanjay taking the minor victim girl and he had indicated this fact to Vijaykumar and PW-Renuka. But we are not legally entitled to draw any inference because no legal evidence in this regard which can be said to be a substantive piece of evidence is available on record. The contradictions brought by the prosecution during the cross-examination of Brijeshkumar cannot be read as

substantive piece of evidence. But it emerges from record specifically that at the instance of Renuka, Vijaykumar had gone to search for her victim daughter. She has stated in her deposition that this Vijaykumar brought the minor victim and had handed over the minor victim, who was bleeding from vagina, to PW-Renuka. She has also stated that the accused was apprehended before Renuka had proceeded to get medical assistance for the minor victim with Vijaykumar and the accused was in a drunken condition. Her this version is in the nature of direct evidence and if is found trustworthy then the examination of Vijaykumar would be a duplication for establishment of one fact that minor victim when was not seen playing on the 'Otta' abutting to the house of PW-Renuka, she sought for help of Vijaykumar and ultimately Vijaykumar brought minor victim with bleeding vagina in couple of minutes and both of them i.e. PW-Renuka and Vijaykumar had proceeded to a doctor to get medical assistance for minor victim and by that time the accused was apprehended and he was found drunk. According to us, in absence of evidence

of Vijaykumar, it was not possible for the learned trial Judge to ignore the evidence of PW-Renuka which is direct in nature as to the events that occurred since when she realized the absence of her victim girl on 'Otta' and ultimately took the victim to get medical assistance with the help of Vijaykumar. In the same way, the evidence of PW-Renuka is also direct that Vijaykumar had accompanied her when her minor daughter was taken to Dr.Tripathi and thereafter, to Civil Hospital for treatment as advised by Dr.Tripathi. The defence cannot legally argue that in absence of evidence of Dr.Tripathi, this version of Renuka is inadmissible. For the sake of argument, hypothetically, one another possibility that might have occurred during trial if is considered, then also it does not affect adversely the strength of the evidence led by PW-Renuka and this possibility is of hostility, on examination, shown by Vijaykumar and even by Dr.Tripathi. In such a situation, it was legally possible for the learned trial Judge to evaluate the solitary evidence of Renuka and if the Court is able to hear the

ring of truth in her version then it can consider this part of the evidence as a direct evidence. Here Mr.Shah, in response to the query raised by us, has fairly accepted that sufficient evidence as to commission of rape on minor victim is led by prosecution and non-examination of Dr.Tripathi would not destroy the evidence given by two doctors of Civil Hospital, Surat, where the minor victim was taken for treatment and where she was admitted. So when the prosecution has proved that the victim girl has been sexually harassed and has been raped, the nature of evidence led by the prosecution is satisfactory to link the accused with the crime, is the crucial question and according to us, this crucial question is satisfactorily dealt with by the learned trial Judge.

8. There is some force in the argument of Mr.Shah that while evaluating the evidence some legal deviations have been made by the learned trial Judge while discussing the case of the prosecution and nature of evidence led by prosecution for linking the accused with the

crime. This Court being an Appellate Court while dealing with the appeal against the order of conviction and sentence can consider the decision of the learned trial Judge in the background of the evidence available on record and confirm the inferences drawn by the learned trial Judge and the finding recorded. On careful reading of the entire decision, we are of the view that there is no element of patent illegality in accepting the evidence led by the prosecution and the conviction is not based on inadmissible evidence. The conviction is based on direct as well as circumstantial evidence and the weaknesses pointed out before the learned trial Judge and to us on behalf of the accused are not sufficient for reversal of the finding. The contradictions and inconsistencies pointed out to us are not that significant or serious in nature. We have considered certain contradictions, inconsistencies and other infirmities pointed out to us on behalf of the accused.

9. We have considered these crucial aspects. It

is true that the Investigating Officer has acted casually in such a serious and sensitive case and in drawing various panchnamas and arresting the accused; and it was not impossible for the Investigating Officer or the responsible officer in-charge of the case to bring Vijaykumar before the Court even by seeking assistance from the local police of the concerned State. But when it appears that certain attempts were made by the police to serve process to Vijaykumar, some lapses on the part of the Investigating Officer should not be given weightage more than required when other evidence of satisfactory nature is available on record. In more than one decision, this Court and the Apex Court has observed that the lapse on the part of the Investigating Officer cannot be and should not be treated as advantage to the accused; unless he is available to show that such lapse or negligence has caused a serious prejudice to his defence. Before us, Mr.M.P. Shah has not successfully pointed out as to what prejudice is caused to the accused for the alleged lapses on the part of the Investigating

Officer. On the contrary, according to us, the action of the Investigating Officer in accordance with the propositions placed by Mr.Shah could have given more strength to the case of the prosecution. The case of the prosecution if is able to stand successfully on certain pillars then which type of other pillars or design could have added the strength to the structure of the case, would not be a matter of much relevance. The prosecution is supposed to establish its case beyond reasonable doubt. There is ample consistency as to the involvement of the accused in the incident between two material witnesses examined by the prosecution i.e. Renuka and her husband i.e. father of victim girl. In such a case, the status of these two witnesses of being close relatives of the victim girl would not go against the prosecution. In such a fact situation, the evidence of these witnesses requires close scrutiny and the evidence of Vijaykumar and hostility of PW-Brijeshkumar, whether makes the evidence of these two witnesses i.e. Renuka and Gajendra Pande, mother and father

of the victim respectively, shaky or doubtful, was the question and according to us, the learned trial Judge has not committed any error in accepting the say of Renuka. It is true that the language of the judgment creates an impression that the say of Vijaykumar also has been indirectly considered or read but this Court being the Appellate Court can legally appreciate the case placed before the learned trial Judge and the evidence led in support thereof and, according to us, there is direct ample evidence to link the accused with the crime and this direct evidence led by Renuka and Gajendra gets corroboration from the medical evidence led by the prosecution. We are not discussing the nature of injuries found on the body of the victim girl and the other noting made by the experts in the case papers as well as medical certificates issued by them because the learned counsel appearing for the accused has fairly accepted that the heinous act of commission of rape has been committed but according to the appellant, there is no legal or satisfactory evidence to link him with the crime. We would like to

mention certain aspects which needs consideration in this regard are :

(i) Dr.Jignesh Shah, Ex.24, PW-8, in his Examination-in-Chief has stated that the mother of the victim had not given the name of the culprit. However, he has also further stated that they are not writing the name of the culprit/s even if the same is given.

(ii) The entire bunch of papers of hospital is produced but none of the doctors has stated as to which papers are of OPD and which are of the treatment given to the victim after her admission in the hospital. The hospitals are maintaining record normally of outdoor and indoor patients. More than one doctor might have attended the victim when she was taken to the said Civil Hospital. The learned trial Judge has not considered any unexhibited

document.

(iii) The case papers Ex.30 reveal that these papers of the bunch of papers relate to the examination of victim after her admission in the hospital on 17th May, 1999 at 3-10 a.m. As per the history given by the mother of the minor victim, the patient i.e. minor victim was sexually assaulted by some one at 08-00 p.m. on 16th May, 1999. So there is consistency as to the time of offence given by important prosecution witnesses and the area where minor girl was victimised.

(iv) The hospital papers reveal a formal consent of the guardian which was obtained before examining the minor victim and as per the established practice followed by the hospitals of this country and medico-legal ethics, such permission has to be obtained. So the Court reasonably

can infer that such consent must have been obtained before examining minor victim on account of history given by her mother Renuka as to the alleged sexual assault.

(v) The Investigating Officer ought to have recorded the statements of all the doctors whose hand-writings are reflected in the case papers. When Dr.Jignesh Shah examined the minor victim after her admission in the hospital at 03-10 a.m. on 17th May, 1999, the OPD case papers were very well available.

9. The entire conduct of Vijaykumar against the allegations made by the defence side, is found to be a conduct of an innocent person and when Renuka herself says that she had requested and deputed Vijaykumar to search the minor victim and Vijaykumar thereafter brought minor victim in a bleeding condition, rules out the possibility of his involvement in the crime. We are also not convinced on the argument that the prosecuting agency or the parents of the

minor girl had asked Vijaykumar to leave City and he had left Surat City under threats. On the contrary, with a view to help the accused, this witness had opted to hide himself from Court proceedings instead of turning hostile like Brijesh Kumar. When the highest Court of the country has said that in a rape case the accused can be convicted on the sole testimony of the female raped or sexually assaulted; then in the case where minor girl of very tender age like the present minor victim, the accused can be held guilty of the sexual assault or rape on the testimony of anyone who is a sound reliable witness. Renuka had no reason to implicate the accused-Dhananjay instead of Vijaykumar or Brijesh Kumar or any third person.

9.1 It appears from record that the accused-Dhananjay after the alleged incident was not able to escape from the people residing in the neighbouring area and he was arrested by the police in couple of hours. Even Gajendra Pande had rushed to the hospital at the instance of the people residing in the neighbouring area of

his house and on the information given by the hospital authority, the police had rushed to the hospital. Govindbhai-PW-10, Ex.44, has stated specifically that he has recorded the complaint of Gajendra Pande-father of the victim in the Surat Civil Hospital. When he received “Vardhi” from New Civil Hospital, Surat, about sexual assault, he left the Police Station for recording the complaint after making necessary entry in the register. This entry is of cryptic nature. Prior to the message sent to the Police Station, victim was already admitted in the hospital before 03-10 a.m. on 17th May, 1999. The entry is of 03-30 a.m. and thereafter, this witness has recorded the complaint of Gajendra Balram Pande-father of the victim in Ward NO.2 of the hospital. So the complaint given by Gajendra Pande to the Police Officer is the FIR within the meaning of Section 154 of the Code of Criminal Procedure, 1973.

9.2 The basic case of the prosecution when is able to stand on the story unfolded for the first time before the police, the Court should not

go in useless or insignificant technicalities. The serological report by FSL clearly indicates that the underwear popularly known as “Jangiya” recovered from the body of the person accused was found stained with blood group 'B' and semen. In the say way, it also reveals that “Chaddi” recovered as a cloth put on by victim girl at the time of incident was found stained with blood and semen. As per the report of the FSL, the blood group of victim girl was of 'B' group. However, no injury on the body of the person accused which can be said to be external bleeding injury was found when he was examined by the doctor. It is true that Investigating Officer has not sent the blood of the person accused for examination. It is very likely that he also might be having the same blood group but in absence of any external injury on the body of the person accused-Dhananjay, the Court cannot ignore the nature of explanation given by the accused on this point as to why the blood of group 'B' was found on 'Jangiya' put on by the accused. It is not the defence of the accused that he is impotent. It is true that when the accused was examined by Dr.Meghaben

Mehta, no marks of external injury were found on genetic organ but during the course of cross-examination it has come on record that it is not possible to penetrate genetic organ of 7X3 cms. or 10 cms. in a vagina of a girl below 2 years of age. The said doctor has stated that on attempt of forcible penetration, the culprit may receive injury on his genetic organ. Here the accused may not have successfully penetrated his genetic organ in the vagina. But the attempts for full penetration might have torn the hymen and some other skin in the area was also found torn.

9.3 The certificate Ex.50 as well as the version of Dr.Meghaben reveals that the accused was brought for examination on 18th May, 1999 at about 11.30 a.m. So after lapse of more than 36 hours, he was taken for examination, when the said doctor has opined that there are chances of sustaining injury. The absence of any visible injury when the accused was examined by the doctor would not take this Court to a conclusion that in a given circumstances the injury or any other reddish swelling may not have sustained for 36 hours. The evidence of a

doctor is nothing but an opinion and in more than one case this Court and the Apex Court have commented on the opinion evidence. The slightest penetration may cause an injury in the vagina of a very tender aged girl like the minor victim and at the same time, it may not cause any visible injury which could last for many hours, which normally could cause during full penetration in the vagina of a girl having some more development in the genetic organ like a girl of more than 6 to 7 years of age. So the argument advanced by Mr.M.P. Shah that Medical Certificate of examination of accused should be accepted and read as a certificate of his innocence, is not found acceptable to us.

10. The evidence of Renuka and Gajendra, parents of the minor victim, is consistent on the point that name of the accused-Dhananjay as culprit was disclosed and he was apprehended. It is true that no independent corroboration has come on record on this point; especially when the Investigating Officer has failed to draw a formal arrest panchnama at the residence of the complainant and Renuka. This

is a foolish mistake committed by the Investigating Officer and no vigilant officer normally would commit such a mistake or at least he could say in a satisfactory manner to the Court as to why and when the accused was brought at the spot from where he has been arrested. The answers given by the Investigating Officer on this point during the course of his cross-examination are very casual and they create an impression in the mind of the Court that the Investigating Officer was not serious or sensitive on the matter and/or he was in a mood to help the defence-side. According to us, it was very much possible for the Investigating Officer to record the statement of a person whose hand-writings are there in the original case papers of the hospital at Mark 25/1-8 and the reverse-side of the papers and he could have ascertained as to who has written the name of the accused as a person who made the alleged 'sexual assault'. We are not in a position to ignore one fact that the culprit was arrested immediately after the registration of the complaint in couple of hours from the time of

registration of the complaint. We have also carefully seen the reports sent to the learned Judicial Magistrate First Class under Section 157 of the Code of Criminal Procedure, 1973, which are available on record.

11. It is not possible to observe in the present case that the complaint registered by the police in the present case is a delayed complaint and the same is recorded at a belated stage only with a view to implicate the accused vice Vijaykumar or any other culprit. The prosecution or PW-Renuka has no axe to grind against the accused and there was no reason for her in a couple of minutes to make up her mind to implicate the accused-Dhananjay as an accused vice her tenant Vijaykumar. It is the experience of Criminal Courts that normally a victim or a witness very close to victim would not let go the real culprit. It is noticed that such witness would try to implicate other or more number of persons to attach gravity to the offence or to implicate more number of persons but that fact situation is not there in the present case.

Why an important eye-witness i.e. Brijesh Kumar, PW-6, Ex.23, has not supported the case of the prosecution in such a sensitive case, is also a question but the prosecution is not supposed to answer this question. But the fact that Vijaykumar had left Surat for the reasons best known to him, if is considered then for such or similar reason or with a view to oblige the defence-side, he may not have been tested as per his original version before the Investigating Officer. We have considered the point as to what would have happened to the case of the prosecution if Vijaykumar had left Surat and the prosecution could not have secured his presence in the Court. According to us, this would not have given birth to any fatal infirmity to the case of the prosecution. The learned Judge could have based the confirmation on the evidence led by Renuka, mother of the victim; Gajendra Pande-complainant-father of the victim and the opinion evidence collected from the Civil Hospital, Surat and the FSL. It is true that the panchnama drawn for collecting certain articles which were sent for analysis to FSL,

was not proved legal by the panchas examined, but the evidence of Investigating Officer in this regard is found reliable. This part of the version of the Investigating Officer stood to the test of examination. It is true that number of errors have been committed by the Investigating Officer and many infirmities have been left by him but as observed earlier, these lacunas are of such a nature that absence of these infirmities might have added more strength to the case of the prosecution and the same have not created any prejudice to the defence-side. The learned trial Judge was not convinced with contention raised by the defence counsel that the infirmities left by the Investigating Officer have resulted into prejudice to the accused. We are also not convinced that the infirmities pointed out by Mr.M.P.Shah are able to uproot the strength of the case of the prosecution.

12. It is true that there is no direct evidence as to lifting of the minor victim girl when she was playing on 'otta', by the accused because PW-Brijesh Kumar has not supported the case of

the prosecution and Vijaykumar, who had seen the minor victim on the body of the person accused at the bank of 'Khadi', has not been examined. So it is possible to argue that there is no evidence to link the accused with the crime of the offence punishable under Section 363 of the Indian Penal Code and for the same reason the accused cannot be held guilty for the offence punishable under Section 366 of the Indian Penal Code because the version of Renuka that the facts stated by Vijaykumar to Renuka about the accused-Dhananjay and his conduct would not be admissible and the scheme of Section 32 and/or Section 33 of the Indian Evidence Act, would not help the prosecution in the background of the settled legal position, especially when all sincere and serious attempts were made by the prosecution to secure the presence of Vijaykumar. But the basic story of the prosecution has been brought on record by proving contradictions of PW-Brijesh Kumar with other material aspects i.e. apprehension of the accused-Dhananjay from the spot, etc. have been proved by Renuka. She has also

proved that at her instance Vijaykumar had gone to find out missing minor victim girl and Vijaykumar handed over the minor victim to Renuka with bleeding vagina. So when it is proved beyond doubt that the appellant-accused has committed a serious crime of rape, the accused can successfully be linked with the offence punishable under Sections 363 and 366 of the Indian Penal Code because unless a minor girl aged about 2 (two) years is taken from the legal custody of her guardian, with a particular intention, which is made punishable under Section 363, she could not have been made subject/victim of the illegal forcible intercourse. So observing that the technical arguments would not help the accused, we are inclined to accept the observations assigned by the learned trial Judge in the judgment and order of conviction and sentence.

13. The report under Section 157 of the Code of Criminal Procedure, 1973, had reached to the learned Judicial Magistrate First Class, Surat on 17th May, 1999 at 13-20 hrs. i.e. within 3 hours from the time of opening of the Court.

We are not convinced with the argument that the accused-Dhananjay has been falsely implicated or there is any shadow of doubt qua the guilt of the accused and/or it is not safe to accept the version of Renuka because her conduct till she narrated the entire story to her husband and thereafter, impliedly corroborates her version, a sick brother-in-law if was not aware, at the relevant point of time about the gravity of the act and offence, would not make the case of the prosecution bad. Many a times, the people are not attentive or serious in a serious or very important matter. The Courts are supposed to consider the totality emerging from the evidence keeping balance between the accused, in whose favour there is a strong presumption of innocence and the victim of the crime. According to us, the learned trial Judge has rightly held the accused-Dhananjay guilty of the offence punishable under Sections 363, 366 and 376 of the Indian Penal Code and hence, the present appeal is required to be dismissed.

14. In view of above observations and discussion, the present appeal is hereby dismissed.

(C.K. Buch, J)

(Harsha Devani, J)

Aakar